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Issue Preclusion - Assessing the Issue Preclusive Effect of State Agency Decisions in the Third Circuit

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ISSUE PRECLUSION—ASSESSING THE ISSUE PRECLUSIVE EFFECT OF STATE AGENCY DECISIONS IN THE THIRD CIRCUIT

I. INTRODUCTION

Congress' scheme for enforcing many of the federal anti-discrimination laws requires significant coordination with the state administrative agencies charged with preventing discrimination at the state and local levels.[1] Specifically, many of the federal anti-discrimination statutes prohibit individuals from requesting relief from federal agencies until after state agencies have had an opportunity to resolve the complaint.[2] Moreover, the interaction of state and federal law may require more than one state agency to resolve factual disputes. For example, in the employment context, the same allegedly discriminatory conduct may give rise to claims for pecuniary relief under a state's unemployment compensation law and under a federal anti-discrimination statute.[3] When federal litigation com-

1. *See, e.g.*, 29 U.S.C. § 633(b) (1988) (setting forth enforcement provisions of Age Discrimination in Employment Act (ADEA) and providing that if alleged unlawful practice occurs in state that prohibits discrimination in employment because of age, no suit may be brought under ADEA until earlier of 60 days after proceedings have been commenced under state law or until such state law proceedings have been terminated); 42 U.S.C. § 2000e-5(c) (1988) (setting forth enforcement provisions of Title VII of Civil Rights Act of 1964 (Title VII) and providing that if alleged unlawful employment practice occurs in state that prohibits unlawful employment practice alleged, no charge may be filed under Title VII until earlier of 60 days after proceedings have been commenced under state law or until state law proceedings have been terminated); 42 U.S.C. § 12117 (Supp. V 1993) (setting forth enforcement provisions of Americans With Disabilities Act (ADA) and incorporating Title VII enforcement provisions by reference). *See generally* STEPHEN N. SHULMAN & CHARLES F. ABERNATHY, THE LAW OF EQUAL OPPORTUNITY EMPLOYMENT ¶ 7.02(1) (1990) (describing interaction of Equal Employment Opportunity Commission and analogous state agencies in litigation under Title VII of Civil Rights Act of 1964).

2. *See, e.g.*, 29 U.S.C. § 633(b). The ADEA, in pertinent part, reads:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age, . . . no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated . . . .

Id.; 42 U.S.C. § 2000e-5(c). Title VII, in pertinent part, reads:

> In the case of an alleged unlawful employment practice occurring in a State . . . which has a . . . law prohibiting the unlawful employment practice alleged . . . , no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated . . . .

Id. (footnote omitted); 42 U.S.C. § 12117 (incorporating Title VII enforcement provisions by reference).

3. *See, e.g.*, 43 PA. CONS. STAT. ANN. § 821(a) (1991) (Pennsylvania's Unemployment Compensation Statute). Under this statute, for example, an individual who leaves work in Pennsylvania to avoid discrimination or harassment would file a

mences after state agency proceedings have been completed, debate exists about whether the factual findings of the state agency, or agencies, have issue preclusive effect in the subsequent lawsuit based on the federal statute.[4]

This Comment discusses the approach taken by the United States Court of Appeals for the Third Circuit in determining whether or not to afford issue preclusive effect to state administrative agency findings in subsequent lawsuits alleging discrimination in violation of a federal statute.[5] Section II of this Comment discusses collateral estoppel and res judicata and provides an overview of state administrative proceedings.[6] Section II continues to examine the framework developed by the United States

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claim for compensation with the Pennsylvania Unemployment Compensation Board of Review. *Id.* In addition, the individual likely will want to seek relief under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(a) (1988). Title VII creates a cause of action for those individuals who believe that their employer has discriminated against them. *See id.* ("It shall be an unlawful employment practice for an employer to . . . refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .").

In a typical case in which an individual believes that he or she has been subjected to discrimination in the workplace, the individual commences a Title VII lawsuit by contacting the Equal Employment Opportunity Commission (EEOC), the federal agency empowered to prevent unlawful employment practices. *Id.* § 2000e-5(a). However, before permitting the complainant to file a formal charge with the EEOC, Title VII requires that the EEOC first determine whether the alleged unlawful employment practice occurred in a state, or political subdivision of a state, which has a state or local law prohibiting the unlawful employment practice. *Id.* § 2000e-5(c). If such a state or local law exists, Title VII requires that the EEOC prohibit the complainant from filing a charge under Title VII until the expiration of sixty days after proceedings have been commenced under that law. *Id.*

Because of this dual enforcement strategy, findings concerning the existence or non-existence of discriminatory conduct likely will be made by state and federal factfinders. Under Pennsylvania law, a complainant who wants to proceed under Title VII must begin by asking the Pennsylvania Human Relations Commission to find facts concerning the existence or non-existence of discriminatory conduct. *See* 43 PA. CONS. STAT. ANN. § 959(a) (Supp. 1993) (charging Pennsylvania Human Relations Commission with task of investigating and resolving claims of discrimination within Pennsylvania).

4. *See, e.g.*, Charles C. Jackson et al., *The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits*, 79 MICH. L. REV. 1485, 1489 (1981) (proposing "general guidelines for application of preclusion doctrines in Title VII litigation" and arguing that "doctrines of res judicata and collateral estoppel should preclude relitigation of claim and issues that were or could have been fully and fairly litigated in a state proceeding" only when that state's fair employment practices laws parallel Title VII); Marjorie A. Silver, *In Lieu of Preclusion: Reconciling Administrative Decisionmaking and Federal Civil Rights Claims*, 65 IND. L.J. 367, 369 (1990) (arguing that United States Supreme Court's expansive view of preclusion doctrine "has frustrated the substantive purpose of federal civil rights laws").

5. For a discussion of the Third Circuit's approach to determining the preclusive effect of state agency decisions in later lawsuits based on the federal anti-discrimination statutes, see *infra* notes 50-80 and accompanying text.

6. For a discussion of the concepts of collateral estoppel and res judicata and

Supreme Court for analyzing this issue and shows how the Third Circuit has used this framework in cases involving factual determinations made by the Pennsylvania Unemployment Compensation Board of Review (the Board) concerning the existence of discriminatory conduct.[7] Section III of this Comment discusses the important factors involved in determining the issue preclusive effect of state agency decisions in subsequent lawsuits based on federal anti-discrimination statutes and reviews the role of the state law of collateral estoppel in the Third Circuit's decisional framework.[8] In addition, this section summarizes the present state of the law in the Third Circuit with respect to each of the federal anti-discrimination statutes.[9] Finally, Section IV concludes that the Third Circuit's approach to this issue has been consistent with the guidelines set forth by the United States Supreme Court and the policies that underlie collateral estoppel.[10]

II. BACKGROUND

A. *Distinguishing Between Collateral Estoppel and Res Judicata*

Although courts and practitioners often use the terms interchangeably, res judicata differs from collateral estoppel.[11] Properly, res judicata is used to refer to the preclusive effect on the claim or cause of action.[12] The general rule of claim preclusion is "that a party ordinarily may not assert a civil claim arising from a transaction with respect to which he has prosecuted such a claim, whether or not the two claims wholly correspond

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an overview of the administrative proceedings of a typical state agency, see *infra* notes 11-26 and accompanying text.

7. For a discussion of the framework provided by the United States Supreme Court for use in evaluating the issue preclusive effect of state agency decisions in subsequent lawsuits based on the federal anti-discrimination statutes and Third Circuit decisions made in light of this framework, see *infra* notes 27-80 and accompanying text.

8. For a discussion of the factors that a practitioner should review in analyzing the preclusive effect of state agency findings in subsequent lawsuits based on the federal anti-discrimination statutes, see *infra* notes 81-112 and accompanying text. For a discussion of the role of the state law of collateral estoppel in the Third Circuit's decisional framework, see *infra* notes 97-112 and accompanying text.

9. For a discussion of the current state of the law in the Third Circuit concerning this issue with respect to each of the federal anti-discrimination statutes, see *infra* notes 113-46 and accompanying text.

10. For a discussion of the appropriateness of the Third Circuit's approach to this issue in light of the role of state administrative decisionmakers in the enforcement of federal anti-discrimination efforts and the policies underlying collateral estoppel, see *infra* notes 147-50 and accompanying text.

11. *See* RESTATEMENT (SECOND) OF JUDGMENTS 4 (1982) (noting, in introduction to Restatement, liberality in use of term res judicata); *see also* Tonka Corp. v. Rose Art Indus., Inc., 836 F. Supp. 200, 210 (D.N.J. 1993) ("The term res judicata has been given a variety of meanings, some of which incorporate the distinct concept of collateral estoppel."). This Comment addresses only the issue of preclusive effect (collateral estoppel) of state agency decisions; it does not discuss claim preclusion (res judicata).

12. RESTATEMENT (SECOND) OF JUDGMENTS 4.

to each other."[13]

In contrast, the rule of issue preclusion, also known as collateral estoppel, is "that a party ordinarily may not relitigate an issue that he [or she] fully and fairly litigated on a previous occasion."[14] More specifically, the general rule of issue preclusion is that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."[15]

B. *Overview of State Administrative Proceedings: The Original Decision Makers*

Proceedings by most state administrative agencies that have judicial-type authority are substantially similar.[16] Generally, a complainant brings a claim or a charge against an individual or entity and before a bureau or board of the state agency. The bureau or board then finds facts and applies the law to these facts to reach a decision.[17]

Proceedings under Pennsylvania's Unemployment Compensation Law provide an excellent example of the operation of state agency proceedings. Under Pennsylvania law, the Department of Labor and Industry (the Department) is the state agency charged with administering Pennsylvania's Unemployment Compensation Law.[18] Pennsylvania's law and regulatory code permit an individual who leaves work because of discrimination by an employer or co-worker to initiate a claim for unemployment compensation by applying for benefits with the Bureau of Employment Security of the Commonwealth of Pennsylvania (the Bureau), the state agency charged with initially determining the validity of unemployment compensation claims.[19]

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13. *Id.* at 1; *see also id.* §§ 18-26 (discussing effects of personal judgments on original claim, counterclaim and scope of claim).

14. *Id.* at 1. *See generally* Austin W. Scott, *Collateral Estoppel By Judgment*, 56 HARV. L. REV. 1 (1942) (providing excellent discussion of theoretical underpinnings of doctrine of collateral estoppel, authored by reporter for Restatement of Judgments).

15. RESTATEMENT (SECOND) OF JUDGMENTS § 27. Comment (c) to § 27 of the Restatement of Judgments points out that the most difficult aspect of applying § 27 will be determining whether the issue in the first action is the same issue litigated in the second action. *Id.* § 27, at cmt. c.

16. *See* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 120 (1993) (stating that "agencies typically determine, by finding facts and interpreting statutes and other sources of law, whether conduct by individuals conforms to laws that agencies implement").

17. *See* BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 1.6, at 12-13 (3d ed. 1991) (using New Jersey Workmen's Compensation Division and Federal Trade Commission to describe duties of typical state and federal agencies).

18. 43 PA. CONS. STAT. ANN. § 761(a) (1992).

19. 43 PA. CONS. STAT. ANN. § 821(a) (1991). In pertinent part, § 821 states that the Department of Labor and Industry of the Commonwealth of Pennsylvania

Under Pennsylvania law, the Bureau must deny benefits to applicants who allege discrimination if, after investigating the claim, the Bureau determines that there was no discrimination, and therefore, the applicant left work voluntarily without the statutorily required cause of a necessitous and compelling nature.[20] If the Bureau denies the applicant's claim, the applicant may appeal.[21] A Department appointed referee hears the appeal, which gives the applicant an opportunity to tell his or her story in a quasi-judicial setting.[22] If the referee renders a decision adverse to the

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(the Department) "shall promptly examine each application for benefits and on the basis of the facts found by it shall determine whether or not the application is valid." *Id.* In practice, the Department has delegated this task of initially determining the validity of a claim to the Bureau of Employment Security of the Commonwealth of Pennsylvania (the Bureau). *See* 34 PA. CODE § 65.61 (1990) (stating that Bureau issues decisions invalidating claims but not until claimant has chance to refute alleged facts); *see also id.* at §§ 65.22-.63 (describing application procedure for benefits under Pennsylvania's Unemployment Compensation Law); Maurice Abrams, *The Pennsylvania Unemployment Compensation Board of Review—Scope of its Functions and Responsibilities*, 36 TEMP. L.Q. 436, 436-42 (1963) (describing claims procedures under Pennsylvania's Unemployment Compensation Law).

20. 43 PA. CONS. STAT. ANN. § 802(b) (1991). Section 802 sets forth a number of grounds upon which the Bureau may justify determining that an applicant is ineligible for unemployment compensation. *Id.* § 802. Section 802(b) states that an "employee shall be ineligible for compensation . . . [if] his [or her] unemployment is due to voluntarily leaving work without cause of a *necessitous and compelling nature.*" *Id.* § 802(b) (emphasis added). Pennsylvania state courts have held that leaving a job because of discrimination satisfies the necessitous and compelling requirement of § 802(b). *See, e.g.*, Taylor v. Unemployment Compensation Bd. of Review, 378 A.2d 829, 834 (Pa. 1977) (holding that racial discrimination satisfied cause of necessitous and compelling nature requirement); MacGregor v. Commonwealth Unemployment Compensation Bd. of Review, 415 A.2d 141, 142 (Pa. Commw. Ct. 1980) (proving charge of age discrimination would constitute cause of necessitous and compelling nature); Pianelli v. Unemployment Compensation Bd. of Review, 368 A.2d 1339, 1341 (Pa. Commw. Ct. 1977) (holding that failure to pay employee equal compensation for equal work on basis of gender constitutes cause of necessitous and compelling nature).

21. 43 PA. CONS. STAT. ANN. § 821(e) (1991); *see, e.g.*, Roth v. Koppers Indus., Inc., 993 F.2d 1058, 1059 (3d Cir. 1993) (former employee appealing adverse decision by Bureau concerning cause of employee's termination); Kelley v. TYK Refractories, Co., 860 F.2d 1188, 1190 (3d Cir. 1988) (former employee appealing adverse decision by Bureau concerning cause of employee's termination). In addition to the applicant's appeal, the claimant's last employer would also appeal an adverse decision by the Bureau in order to prevent the Department from charging the employer's reserve account with a portion of the state's cost of funding the claimant's unemployment. *See* 43 PA. CONS. STAT. ANN. § 782(a)(1) (setting forth procedures for establishing and maintaining employer's reserve accounts); *see also* Edmundson v. Borough of Kennett Square, 4 F.3d 186, 190 (3d Cir. 1993) (explaining why employers have financial interest in outcome of unemployment compensation cases brought by their employees).

22. 43 PA. CONS. STAT. ANN. § 822 (1991). Under Pennsylvania law, the referee may examine the parties and their witnesses. 34 PA. CODE § 101.21(a) (1988). In addition, when a party proceeds *pro se*, the referee must advise the party of his or her rights and aid him or her in cross-examining witnesses. *Id.* Moreover, the parties generally have an opportunity to present "the evidence and testimony which they believe is necessary to establish their rights." *Id.* § 101.21(b).

applicant, the applicant may make a final administrative appeal to the Board.[23] If the Board also rules against the applicant, the applicant's only recourse is to appeal the Board's decision to the Commonwealth Court of Pennsylvania.[24]

In Pennsylvania, a claimant's right to judicial review does not attach until after the claimant has exhausted all potential administrative remedies.[25] Moreover, even when a court hears an appeal, in certain circumstances, the court's determination may have issue preclusive effect in subsequent lawsuits, thereby eliminating the claimant's hope for relief in a subsequent lawsuit based on a federal anti-discrimination statute.[26] Because of this possibility, practitioners should proceed cautiously when deciding whether or not to seek judicial review of agency decisions.

C. *Preclusive Effect of State Agency Findings in Subsequent Lawsuits*

1. *United States Supreme Court Decisions: A Framework for Analysis*

The United States Supreme Court, in *Kremer v. Chemical Construction Corp.*[27] and *University of Tennessee v. Elliott*,[28] established certain parameters for issue preclusion in the federal courts.[29] In *Kremer*, the Court held that

23. *See* 43 PA. CONS. STAT. ANN. § 822 (stating that referee's decision shall be final decision of Board unless either party files appeal); *Id.* § 832 ("Upon the final determination of any appeal, the board shall enter an order in accordance with the decree of the court.").

24. 42 PA. CONS. STAT. ANN. § 5105(a)(2) (1981). Section 5105(a)(2) provides that "[t]here is a right of appeal . . . from the final order . . . of every . . . [g]overnment unit which is an administrative agency . . . to the court having jurisdiction of such appeals." *Id.* In Pennsylvania, the Commonwealth Court has exclusive jurisdiction of appeals from final orders of the Unemployment Compensation Board of Review. *Id.* at § 763(a)(1).

25. Killian v. Commonwealth Unemployment Compensation Bd. of Review, 405 A.2d 1372, 1374 (Pa. Commw. Ct. 1979). In *Killian*, the Unemployment Compensation Board of Review moved to quash the claimant's petition for review on the grounds that the claimant had failed to first exhaust his administrative remedies. *Id.*

26. In analyzing questions of whether to afford collateral estoppel effect to the findings of the Board, the Third Circuit has clearly stated that it finds two factors of paramount concern. First, the court considers the level of state court review received by the agency's findings. *See* Roth v. Koppers Indus., Inc., 993 F.2d 1058, 1061-63 (3d Cir. 1993) (deciding case on ground that state court never reviewed Board's finding). Second, the court requires that the state law requirements of collateral estoppel must be satisfied for the issue in question. *See* Kelley v. TYK Refractories, Co., 860 F.2d 1188, 1194 (3d Cir. 1988) (holding that finding of Board, which was affirmed by state court, had no preclusive effect in subsequent Title VII lawsuit because state law elements of collateral estoppel were not satisfied). For a complete discussion of the Third Circuit's decisions in *Roth* and *Kelley*, see *infra* notes 50-80 and accompanying text.

27. Kremer v. Chemical Constr. Co., 456 U.S. 461 (1982).

28. University of Tenn. v. Elliott, 478 U.S. 788 (1986).

29. *See Elliott*, 478 U.S. at 795-97 (establishing that federal courts must *not* afford issue preclusive effect to findings of state agency in subsequent lawsuit based on Title VII if state court has *not* reviewed state agency's findings); *Kremer*, 456 U.S. at 485 (establishing that federal courts must afford issue preclusive effect to find-

in a subsequent lawsuit based on violations of Title VII of the Civil Rights Act of 1964 (Title VII)[30] a federal court must afford issue preclusive effect to the findings of a state agency if a state court has reviewed those findings.[31] The plaintiff employee in *Kremer* brought a Title VII employment discrimination lawsuit against the defendant employer after a New York court affirmed a state agency's finding that the employer did not discriminate against the employee on the basis of age.[32] In the majority opinion, Justice White held that 28 U.S.C. § 1738 (§ 1738), which requires federal courts to "give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged,"[33] applies to proceedings under Title VII.[34] Specifi-

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ings of state agency in subsequent lawsuit based on Title VII if state court reviewed state agency's findings).

30. 42 U.S.C. § 2000e (1964).

31. *Kremer*, 456 U.S. at 485. The Court, in *Kremer*, stated:

> [T]he usual rule is that merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination in another forum. Such a fundamental departure from traditional rules of preclusion . . . can be justified only if plainly stated by Congress. Because there is no "affirmative showing" of a "clear and manifest" legislative purpose in Title VII to deny . . . collateral estoppel effect to a state court judgment . . . the judgment of the Court of Appeals is *Affirmed.*

Id.

32. *Id.* at 464-65. The plaintiff employee, Kremer, initially filed a discrimination charge with the EEOC. *Id.* at 463. Pursuant to 42 U.S.C. § 2000e-5(c), which states that the EEOC must give state agencies the initial opportunity to resolve discrimination complaints, the EEOC referred Kremer's charge to the New York State Division of Human Rights (NYDHR), the state agency charged with enforcing New York's law prohibiting employment discrimination. *Id.* at 463-64. NYDHR, after investigating the complaint, concluded that there was no probable cause to believe that the employer engaged in the alleged discriminatory conduct. *Id.* at 464. The NYDHR appeal board subsequently upheld the determination. *Id.* In response to the adverse decision by the state agency, Kremer again sought relief from the EEOC and also appealed the agency's decision to the Appellate Division of the New York Supreme Court, which upheld the agency's decision. *Id.*

33. *Id.* at 466; *see also* 28 U.S.C. § 1738 (1988) ("Such Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.").

34. *Kremer*, 456 U.S. at 468. The Court noted that § 1738 applies "unless a later statute contains an express or implied partial repeal" of the section. *Id.* (citing Allen v. McCurry, 449 U.S. 90, 99 (1980)). After scrutinizing the text and legislative history of Title VII, the Court concluded that Title VII contained no such express or partial repeal. *Id.* at 468-76. The Court reviewed the text of Title VII in search of clues that could support a finding that Title VII repealed § 1738. *See id.* at 468 (stating that because there is no claim that Title VII expressly repealed § 1738, if any repeal exists it must be implied). Specifically, the Court looked to see if the provisions of § 1738 and Title VII were in irreconcilable conflict or if Title VII covered the whole subject of § 1738. *Id.* (citing Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976)).

The Court concluded that there was no irreconcilable conflict despite the argument that it is inconsistent to apply § 1738 to subsequent lawsuits based on Title VII, given that Title VII requires a trial de novo in federal court after federal and state agencies have considered a complaint. *Id.* at 468-70. The Court stated that

cally, Justice White stated that in a subsequent lawsuit under Title VII, § 1738 applied in the absence of a "clear and manifest" legislative purpose in Title VII to afford preclusive effect to judgments from the courts of all states.[35] In contrast, in a footnote to the majority opinion, Justice White asserted that unreviewed state agency determinations should not be precluded from review by federal courts, even if the courts of the state in which the agency operates would afford preclusive effect to the state agency's determinations.[36]

In *Elliott*, the Supreme Court elaborated on the issue raised by Justice White's footnote to *Kremer*, holding that federal courts may sometimes afford preclusive effect to unreviewed state agency decisions.[37] In *Elliott*, the plaintiff employee filed a lawsuit alleging violations of Title VII and 42 U.S.C. § 1983 (§ 1983) after a state administrative law judge (ALJ) found that the defendant employer did not discriminate on the basis of race when it fired the employee.[38] In the lawsuit based on Title VII, the employer argued that the ALJ's finding that the employer did not engage in discriminatory conduct prohibited relitigation of the same issue in federal court.[39] In response to the employer's argument, the Court referred to its

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this requirement pertained only to the treatment that federal courts must give to the decisions coming to them directly from administrative agencies. *Id.* at 469. This requirement did not apply to final judgments of state courts. *Id.* at 469-70. Similarly, the Court found that Title VII's requirement that the EEOC give "substantial weight" to findings made in state proceedings was a minimum requirement which did not preclude the EEOC from giving greater weight (i.e., preclusive effect) to findings made in state proceedings when appropriate. *Id.*

35. *Id.* at 485. Specifically, the Court concluded that "[n]othing in the legislative history of the . . . Act suggests that Congress considered it necessary or desirable to provide an absolute right to relitigate in federal court an issue resolved by a state court." *Id.* at 473.

36. *Id.* at 470 n.7 ("[I]t is clear that unreviewed administrative decisions by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a State's own courts.").

37. University of Tenn. v. Elliott, 478 U.S. 788, 794 (1986) ("28 U.S.C. § 1738 governs the preclusive effect to be given the judgments and records of state courts, and is not applicable to the unreviewed state administrative factfinding at issue in this case. However, we have frequently fashioned common-law rules of preclusion in the absence of a governing statute.").

38. *Id.* at 790. In *Elliott*, the employee, Elliott, requested an administrative hearing to contest his proposed termination after being informed that he would be terminated for inadequate work performance and misconduct on the job. *Id.* Before the hearing commenced, Elliott also filed suit in district court alleging that his proposed termination was racially motivated. *Id.* In his suit in district court, Elliott sought relief under Title VII and 42 U.S.C. § 1983. *Id.* at 790-91.

In the hearing before an administrative assistant to the University of Tennessee's Vice President for Agriculture, who presided as an Administrative Law Judge (ALJ), the ALJ determined that the University had proven some, but not all of the charges against Elliott. *Id.* at 791. The ALJ also found that the discharge was not racially motivated. *Id.* Elliott appealed the ALJ's decision to the University of Tennessee's Vice President for Agriculture, who subsequently upheld the ALJ's decision. *Id.* at 791-92. Elliott did not petition Tennessee's state courts to review the administrative proceedings. *Id.* at 792.

39. *Id.* The district court agreed with the University of Tennessee's argument

exposition in prior cases on the language and legislative history of Title VII to conclude that Congress did not intend for federal courts to grant preclusive effect in subsequent lawsuits under Title VII to unreviewed state agency decisions.[40]

In addition to relying on the rationale that it had used previously, the *Elliott* Court added an important analytical tool to the question of issue preclusion by stating that courts can create a federal common law rule of preclusion.[41] In explaining this rule, the Court stated that not only "is [it] sound policy to apply principles of issue preclusion to the factfinding of administrative bodies acting in a judicial capacity," but federal courts must grant an unreviewed state agency decision preclusive effect if a common law rule of preclusion would be consistent with Congress' intent in enacting the particular statute at issue in the subsequent lawsuit.[42]

The *Elliott* Court applied this federal common law rule of preclusion in its analysis of the employee's claims under Title VII and § 1983.[43] The Court reviewed Title VII's enforcement scheme and concluded that no federal common law rule of preclusion existed for Title VII.[44] In its analysis, the Court emphasized that Title VII required the Equal Employment Opportunity Commission (EEOC), when investigating discrimination charges, to give substantial weight to findings made by state authorities.[45] The Court reasoned that Congress would not have included such a provi-

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that Elliott's lawsuit based on federal civil rights statutes was an improper collateral attack on the ALJ's decision. *Id.* The United States Court of Appeals for the Sixth Circuit reversed the district court's judgment. *Id.*

40. *Id.* at 795-97. To support its findings concerning the language and the legislative history of Title VII, the Court referred to its analysis in *Kremer* and its opinion in Chandler v. Roudebush, 425 U.S. 840 (1976). *Elliott*, 478 U.S. at 795. The Court stated that, in *Chandler*, it had held that "a federal employee whose discrimination claim was rejected by her employing agency after an administrative hearing was entitled to a trial *de novo* in federal court on her Title VII claim." *Id.* Next, the Court noted that Elliott, like the employee in *Chandler*, pursued his Title VII claim directly following administrative proceedings and without first seeking redress in state court. *Id.* at 796. Accordingly, the employee was entitled to a trial *de novo* in federal court on his allegations that his employer discriminated against him in violation of Title VII. *See id.* at 799 (affirming portion of judgment of Court of Appeals that denied preclusive effect to agency finding in subsequent Title VII lawsuit).

41. *Id.* at 796. The Court stated that § 1738 governs the preclusive effect of the judgments and records of state courts, but "because § 1738 antedates the development of administrative agencies it clearly does not represent a congressional determination that the decisions of state administrative agencies should not be given preclusive effect." *Id.* at 794-95. Accordingly, the Court considered whether a common law rule of preclusion was appropriate with respect to the respondents claims under Title VII and § 1983. *Id.* at 795.

42. *See id.* at 796 (concluding that Sixth Circuit correctly determined that Congress did not intend unreviewed state administrative proceedings to have preclusive effect on subsequent claims based on Title VII).

43. *Id.* at 795-99.

44. *Id.* at 795-96. The Court asserted that a federal common law rule of preclusion would be inconsistent with its analysis in *Kremer* and *Chandler*. *Id.* at 796.

45. *Id.* at 795; *see also* 42 U.S.C. § 2000e-5(b) (1988) ("In determining

sion in the statute if Congress had intended unreviewed state agency findings to have preclusive effect in federal court.[46] Therefore, the Court held that a federal common law of preclusion could not be fashioned for unreviewed state agency findings in subsequent lawsuits under Title VII.[47]

Conversely, in analyzing § 1983, the *Elliott* Court found that the section's legislative history did "not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion."[48] Therefore, the Court held that a federal common law of preclusion does exist in relation to unreviewed state agency findings in subsequent lawsuits arising under § 1983.[49] After comparing the Court's analysis of Title VII and § 1983, it would seem that a presumption of a federal common law of preclusion exists for unreviewed state agency decisions in subsequent litigation under a federal statute unless the express or implied terms of the statute or its legislative history mandate a contrary result.

2. *The Application of* Kremer *and* Elliott *by the United States Court of Appeals for the Third Circuit*

The United States Court of Appeals for the Third Circuit has addressed the issue preclusive effect of state agency findings several times.[50] Generally, these cases have involved fact patterns directly analogous to those in *Kremer* and *Elliott*, and the Third Circuit has reached conclusions that are consistent with the rules of law set forth by the United States Supreme Court.[51] However, the Third Circuit has not yet needed to employ the federal common law of preclusion analysis of

whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities . . . .").

46. *Elliott*, 478 U.S. at 795 ("[I]t would make little sense for Congress to write such a provision if state agency findings were entitled to preclusive effect in Title VII actions in federal court.").

47. *Id.* at 796 ("We conclude that . . . Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII claims.").

48. *Id.* at 797 (quoting Allen v. McCurry, 449 U.S. 90, 97-98 (1980)). In *Allen v. McCurry*, the United States Supreme Court held that collateral estoppel applied to subsequent lawsuits in federal court based on § 1983. 449 U.S. 90, 97-98 (1980).

49. *See Elliott*, 478 U.S. at 797-98 (citing United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966)). The *Elliott* Court stated that "[w]e have previously recognized that it is sound policy to apply principles of issue preclusion to the factfinding of administrative bodies acting in a judicial capacity." *Id.* at 797-98.

50. Roth v. Koppers Indus., Inc., 993 F.2d 1058, 1059 (3d Cir. 1993) (deciding that factual findings of Pennsylvania Unemployment Compensation Board were not entitled to preclusive effect in subsequent lawsuit based on Title VII when state law requirements of collateral estoppel had not been met); Kelley v. TYK Refractories, Co., 860 F.2d 1188, 1189 (3d Cir. 1988) (deciding that factual findings of Pennsylvania Unemployment Compensation Board were not entitled to issue preclusive effect in subsequent lawsuit based on § 1981).

51. *Roth*, 993 F.2d at 1062 ("Following *Elliott*, the courts of appeals have unanimously concluded that unreviewed administrative agency decisions findings can never be accorded preclusive effect in subsequent Title VII proceedings."); *Kelley*, 860 F.2d at 1193-94 (stating that federal courts must afford agency's decision same preclusive effect that state court would afford such decision, and that state law of

Elliott.[52]

In *Kelley v. TYK Refractories, Co.*,[53] the Third Circuit addressed the issue of whether it would afford preclusive effect in a subsequent lawsuit based on 42 U.S.C. § 1981 (§ 1981) to findings by the Pennsylvania Unemployment Compensation Review Board (the Board) that the Commonwealth Court of Pennsylvania had affirmed.[54] In *Kelley*, the plaintiff employee filed a claim for state unemployment benefits in Pennsylvania after he was terminated by his former employer.[55] The Board denied the employee's claim based on the Board's conclusion that the employee had voluntarily terminated his employment and had not sustained his burden of showing cause of a necessitous and compelling nature.[56] The Board made these findings despite the employee's contention that he was discharged for racial reasons.[57] Subsequently, the Commonwealth Court of

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Pennsylvania would not have granted preclusive effect to decision of Pennsylvania Unemployment Compensation Board).

52. The Third Circuit has, however, recognized the *Elliott* proposition that, in § 1983 cases, unreviewed state administrative factfinding is entitled to preclusive effect in the federal courts. Edmundson v. Borough of Kennett Square, 4 F.3d 186, 189 (3d Cir. 1993). In *Edmundson*, the plaintiff employee filed a lawsuit under § 1983 alleging that he was wrongfully discharged from his position as a police officer because of his adverse comments about the police chief. *Id.* at 188. The employee filed his § 1983 suit after an unsuccessful appeal to the Borough Civil Service Commission of the Borough's decision to discharge him. *Id.* Although the employee initially appealed the decision to the Court of Common Pleas, he subsequently withdrew that appeal. *Id.*

In holding that the unreviewed findings of the Civil Service Commission were not entitled to preclusive effect, the Third Circuit acknowledged the Court's holding in *Elliott*. *Id.* at 192. However, the Third Circuit distinguished the case at bar from *Elliott* on the grounds that the Civil Service Commission's findings were, in essence, legal conclusions rather than findings of fact. *Id.* Accordingly, the Third Circuit found *Elliott* inapposite to the case at bar. *Id.*

53. 860 F.2d 1188 (3d Cir. 1988).

54. *Id.* at 1189-92.

55. *Id.* at 1189-90. The former employee, Kelley, was employed by the defendant, a wholly owned subsidiary of a Japanese trading company. *Id.* at 1189. Kelley contended that he had accepted the position from which he was terminated based on his former employer's promises that it would give Kelley the authority to manage the company according to American customs, laws and business practices. *Id.* at 1189-90. In addition, Kelley contended that, after he accepted the job, the president of the defendant company required Kelley to institute Japanese business practices and violate numerous federal and state laws by discriminating against older employees. *Id.* In addition, Kelley alleged that the company insisted that he engage in unfair labor practices and deprive workers of overtime and vacations. *Id.* at 1190. Furthermore, Kelley contended that he was ordered to fire specific employees and replace them with younger, Japanese males. *Id.*

56. *Id.* at 1191. Initially, the Pennsylvania Office of Employment Security denied Kelley's claim for benefits. *Id.* at 1190. A referee reversed the decision of the Office of Employment Security and determined that Kelley's termination was involuntary, and accordingly, Kelley was entitled to benefits. *Id.* The referee made no findings concerning whether or not the employer discriminated against Kelley. *Id.* In response to the referee's decision, the employer appealed the decision to the Board, which reversed the referee's decision. *Id.* at 1191.

57. *See id.* at 1190 ("In count V of his complaint, Kelley contended that TYK

Pennsylvania affirmed the Board's findings.[58] Between the date of the Board's findings and the Commonwealth Court's affirmation, the employee filed suit under § 1981, alleging that his former employer had violated his civil rights.[59] During litigation under § 1981, the employer contended that the Board's finding that the employer did not engage in discriminatory conduct precluded the employee from relitigating the same issue in federal court.[60]

In its analysis in *Kelley*, the Third Circuit found that § 1738 applied because the Commonwealth Court had affirmed the findings of the Board and rendered a judgment.[61] Section 1738 required the Third Circuit to give the Board's findings the same preclusive effect in the § 1981 action as the Pennsylvania courts would give to the Board's findings.[62] Accordingly, the Third Circuit applied Pennsylvania's common law of collateral estoppel to the facts of the case and determined that the Pennsylvania Supreme Court would not afford the Board's findings collateral estoppel effect because the issues in both lawsuits were not identical.[63] Specifically, the Third Circuit concluded that the issue of discharge before the Board was not the same as the issue of discharge presented in the former employee's § 1981 claim.[64] Because the former employer had not satisfied the requirements of collateral estoppel under Pennsylvania state law, the Third Circuit concluded that the former employee could proceed with the § 1981 lawsuit in federal court without any adverse effects from the prior findings of the Board, even though a state court had affirmed the Board's

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discharged him and denied the exercise of his stock options because he is a white American citizen . . . .").

58. *Id.* at 1192.

59. *Id.* at 1191. Kelley filed his complaint in the Court of Common Pleas of Allegheny County. *Id.* However, the defendant sought and obtained removal of the case to the United States District Court of the Western District of Pennsylvania based on the § 1981 claim. *Id.*

60. *Id.* The employer moved for summary judgment on all counts of Kelley's complaint on the grounds that Kelley had fully litigated the issue of his discharge before the Board. *Id.*

61. *See id.* at 1193 ("[W]e are concerned here with the issue preclusive effects of a state administrative agency's determination, affirmed by a state court. . . . [W]e are therefore required to give the Unemployment Compensation Review Board's factfinding the same preclusive effect to which it would be entitled in the Pennsylvania courts.").

62. *Id.* (relying on Kremer v. Chemical Construction Co., 456 U.S. 461 (1982)).

63. *Id.* at 1193-94. For a discussion of the elements of collateral estoppel under Pennsylvania state law, see *infra* notes 99-103 and accompanying text.

64. *Kelley*, 860 F.2d at 1194. Despite admitting that the issue of discharge was central to litigation under both the Pennsylvania Unemployment Compensation Law and § 1981, the Third Circuit found that the more precise issue of whether the discharge was racially motivated was not determined as part of the proceedings before the Board. *Id.* at 1195-96. Specifically, the court stated that a finding of racial discrimination was not central to the Board's assertion that Kelley did not have a necessitous and compelling cause for a voluntary termination, whereas a finding of racial discrimination is essential in a § 1981 action. *Id.* at 1196.

decision.[65] Therefore, *Kelley* established that in order for a federal court in the Third Circuit to afford collateral estoppel effect to findings of the Board in a subsequent lawsuit under § 1981, a state court must affirm the Board's findings[66] *and* the findings must satisfy the state common law requirements of collateral estoppel.[67]

After deciding *Kelley*, the Third Circuit, in *Roth v. Koppers Industry, Inc.*,[68] addressed the issue whether to afford issue preclusive effect to unreviewed Board findings in a subsequent lawsuit based on alleged violations of Title VII.[69] In *Roth*, the plaintiff employee ceased working for the defendant employer after informing the employer that she was discriminated against and harassed by her co-workers because of her sex.[70] Subsequently, the employee applied for unemployment benefits under Pennsylvania's Unemployment Compensation Law.[71] Upon final review of the employee's claim, the Board concluded that the employee was eligible for benefits because she left work for necessitous and compelling reasons.[72] In addition, the Board found that the employee's co-workers had indeed subjected her to discrimination and harassment.[73] The employer chose not to appeal the Board's decision to the Commonwealth Court of Pennsylvania.[74]

After the Board's decision, the employee filed a complaint in federal district court alleging violations of Title VII.[75] During litigation of the Ti-

65. *Id.* at 1198. The court stated that "the issue of whether TYK discharged Kelley from his employment in violation of 42 U.S.C. § 1981 is not precluded by the decision of the Pennsylvania Unemployment Compensation Board of Review and remains open on remand." *Id.* (footnote omitted).

66. *Id.* at 1193. For a discussion of the necessity of state court review of a state agency decision as a predicate for issue preclusion in subsequent litigation under § 1981, see *infra* notes 123-28 and accompanying text.

67. *Id.* at 1193-94. For a discussion of the necessity of satisfying state law requirements of collateral estoppel as a predicate for issue preclusive effect in subsequent litigation under § 1981, see *infra* notes 123-28 and accompanying text.

68. 993 F.2d 1058 (3d Cir. 1993).

69. *Id.* at 1058.

70. *Id.* at 1059. Shortly after leaving work, the plaintiff-employee, Carol Roth, discussed the conditions of her employment with the vice-president of the defendant corporation. *Id.* The vice-president promised to investigate the allegations of harassment and urged Roth to return to work. *Id.* When Roth failed to return to work, the defendant-employer treated her decision as a voluntary resignation. *Id.*

71. *Id.* Initially, a representative from the Pennsylvania Office of Employment Security denied Roth's application for unemployment compensation benefits. *Id.*

72. *Id.* Roth appealed the initial determination by the Office of Employment Security, only to have a referee affirm the finding that Roth had voluntarily resigned her employment. *Id.* Roth then appealed to the Board, which concluded that Roth resigned for necessitous and compelling reasons because her only choices were to resign or to return to work under the current conditions. *Id.*

73. *Id.* While the Board determined that Roth was subjected to harassment and discrimination, "it did not indicate whether the discrimination was based on sex or some other grounds." *Id.*

74. *Id.*

75. *Id.* at 1059. Roth based her Title VII claim on a hostile work environment

tle VII claim, the employee asserted that a federal court must afford collateral estoppel effect to the Board's findings concerning harassment and discrimination.[76] Despite the employee's contention, the Third Circuit held that it would not afford preclusive effect to findings of the Board in a subsequent action under Title VII when a Pennsylvania court had not reviewed those findings.[77]

The Third Circuit analyzed *Roth* in light of the United States Supreme Court's decisions in *Kremer* and *Elliott*.[78] The Third Circuit found *Elliott* to be directly on point because both *Roth* and *Elliott* involved the unreviewed findings of a state agency.[79] As a result, the Third Circuit concluded that

theory. *Id.*; *see also* Andrews v. City of Phila., 895 F.2d 1469, 1482-86 (3d Cir. 1990) (recognizing cause of action under Title VII based on hostile work environment theory and setting forth plaintiff's burden of proof). In addition to the Title VII claim, Roth also alleged violations of the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1988). *Roth*, 993 F.2d at 1059.

76. *Roth*, 993 F.2d at 1060. The district court rejected this argument on the grounds that Roth had not met all of the requirements for collateral estoppel. *Id.* Specifically, the district court found that the issue decided by the Board was not the same issue disputed in the federal district court. *Id.*

77. *Id.* at 1063.

78. *Id.* at 1061-63. The Third Circuit referred to a key footnote in *Kremer*, which stated that a "state's preclusion rules would not apply [in a subsequent Title VII lawsuit] to unreviewed administrative findings by state agencies." *Id.* at 1061. The Third Circuit then noted that *Elliott* gave meaning to this footnote by examining the enforcement scheme of Title VII, which requires that "substantial weight" be given to findings and orders made by state or local authorities. *Id. Elliott* also stated that this "substantial weight" requirement would be meaningless if the findings were entitled to collateral estoppel effect. *Id.* at 1062. Finally, the Third Circuit noted that, since *Elliott*, all of the courts of appeals have determined that an unreviewed administrative agency finding may not receive issue preclusive effect in a subsequent Title VII lawsuit. *Id.*

79. *See id.* at 1061-62 (discussing impact of Supreme Court's decisions in *Kremer* and *Elliott* on case at bar). *Roth* involved the unreviewed findings of the Pennsylvania Unemployment Compensation Board of Review, which were made pursuant to Pennsylvania's Unemployment Compensation Law. *Id.* at 1058. Similarly, *Elliott* involved the unreviewed findings of an administrative law judge pursuant to proceedings under the Tennessee Uniform Administrative Procedures Act. University of Tenn. v. Elliott, 478 U.S. 788, 790-91 (1986).

In addition, the Third Circuit found no credence in the employee's attempt to distinguish the facts in *Roth* from the facts in *Elliott* on the grounds that *Roth* involved the offensive use of collateral estoppel by the employee, whereas *Elliott* involved the defensive use of collateral estoppel by the defendant employer. *Roth*, 993 F.2d at 1062. The *Roth* court was persuaded by three district courts that have held that *Elliott* bars the offensive use of collateral estoppel in a Title VII action by an employee who had previously filed a successful claim for unemployment compensation benefits. *Id.* (citing Gallo v. John Powell Chevrolet, Inc., 765 F. Supp. 198, 207-08 (M.D. Pa. 1991), Johnson v. Halls Merchandising, Inc., 49 Fair Empl. Prac. Cas. (BNA) 527, 528, 1989 WL 23201, at *2 (W.D. Mo. 1989) and Caras v. Family First Credit Union, 688 F. Supp. 586, 589 (D. Utah 1988)); *see* Gallo v. John Powell Chevrolet, Inc., 765 F. Supp. 198, 207-08 (M.D. Pa. 1991) (discharged salesperson brought action against automobile dealership alleging that she was discharged because of her sex and pregnancy); *see also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331-32 (1979) (comparing merits of offensive collateral estoppel with merits of defensive collateral estoppel).

it would not afford preclusive effect to unreviewed findings of the Board in a subsequent lawsuit based on Title VII.[80]

III. ANALYSIS

Even after *Roth* and *Kelley*, the collateral estoppel effect of reviewed and unreviewed state agency findings in subsequent lawsuits based on alleged violations of federal anti-discrimination statutes is not a settled point in the Third Circuit. Nevertheless, careful study of the Supreme Court's analysis in the *Kremer* and *Elliott* cases, which underlie the Third Circuit's rationale in *Roth* and *Kelley*, reveals several factors that must be considered when applying *Roth* and *Kelley* to other cases arising in the Third Circuit that involve the preclusive effect of prior state agency findings in a subsequent lawsuit based on a federal anti-discrimination statute.[81] These factors include: (1) an examination of the level of state court review of the agency decision;[82] (2) a review of the federal anti-discrimination statute at issue in the subsequent lawsuit;[83] and (3) a determination of whether the state law requirements of collateral estoppel have been satisfied.[84]

A. *The First Factor: Has a State Court Reviewed the Agency Decision?*

The first factor to consider when evaluating the preclusive effect of state agency findings in a subsequent lawsuit under a federal anti-discrimination statute in the Third Circuit is whether a state court has reviewed the agency's findings.[85] Although the factor of state court review is certainly relevant in determining preclusive effect, *Kremer* and *Elliott* demonstrate that the existence or non-existence of state court review of an agency's decision is not dispositive when assessing the potential preclusive effect of an agency's decision in a subsequent lawsuit.[86] The correlation between the existence or non-existence of state court review of a state agency decision and the preclusive effect of the agency's decisions, also

80. *Roth*, 993 F.2d at 1062-63.

81. For a discussion of the factors that are useful in assessing the preclusive effect of state agency decisions in subsequent lawsuits based on the federal anti-discrimination laws, see *infra* notes 82-112 and accompanying text.

82. For a full discussion of the need to examine the level of state court review afforded the agency decision, see *infra* notes 85-92 and accompanying text.

83. For a full discussion of the importance of analyzing the federal statute at issue in the subsequent lawsuit, see *infra* notes 97-112 and accompanying text.

84. For a full discussion of the state law requirements of collateral estoppel, see *infra* notes 93-96 and accompanying text.

85. *See, e.g.*, Kremer v. Chemical Constr. Co., 456 U.S. 461, 468-85 (1982) (discussing application of § 1738 in cases in which state court has reviewed state agency's decision); Kelley v. TYK Refractories, Inc., 860 F.2d 1188, 1193 (3d Cir. 1988) (focusing on level of state court review in *Kremer* and *Elliott* and related importance of this review to issue preclusion in subsequent lawsuit).

86. *See*, University of Tenn. v. Elliot, 478 U.S. 788, 795-99 (1986) (emphasizing need to determine if statute involved in subsequent lawsuit is consistent with federal common law of preclusion); *Kremer*, 456 U.S. at 470-78 (emphasizing need to determine whether statute involved in subsequent lawsuit repeals § 1738).

depends upon the particular federal statute at issue in the subsequent lawsuit.[87] Therefore, as a practical matter, one must simultaneously consider both the factors of state court review and the specific federal statute involved in the subsequent lawsuit when determining the preclusive effect of a state agency decision.

In *Kremer* and *Elliott*, the United States Supreme Court established general rules concerning the preclusive effect of state agency decisions in two situations: (1) when a state court has reviewed the agency decision;[88] and (2) when a state court has not reviewed the agency decision.[89] In *Kremer*, the Court stated that, when a state court has reviewed a state agency's findings, § 1738 requires federal courts to afford the agency's findings preclusive effect in subsequent proceedings under another statute unless that statute expressly or impliedly repeals § 1738.[90] Similarly, in *Elliott*, the Court stated that a federal common law of preclusion should be applied to unreviewed state agency decisions in the absence of a showing that Congress intended to repeal such a common law for a particular statute.[91] Specifically, the Court in *Elliott* stated that, in the absence of a showing of contrary congressional intent, a federal court *must* give unreviewed state agency findings the same preclusive effect those findings would receive in the state's own courts.[92] Thus, *Elliott* has meaning only if the courts of a particular state give preclusive effect to the decisions of their own state's agencies. If the courts of a particular state do not afford preclusive effect to the findings of their own state's agencies, then federal courts have no obligation to give unreviewed agency findings preclusive effect.

B. *The Second Factor: The Statute Involved in the Lawsuit*

The Supreme Court decisions in *Kremer* and *Elliott* established that, regardless of whether a state court has reviewed the decision of the state agency, the treatment of preclusion by the particular federal anti-discrimination statute at issue in the subsequent lawsuit is crucial for determining

87. *See Elliott*, 478 U.S. at 796 ("The question actually before us is whether a common-law rule of preclusion would be consistent with Congress' intent in enacting Title VII.").

88. *Kremer*, 456 U.S. at 463-64 (determining preclusive effect of state agency decision, which the Appellate Division of the New York State Supreme Court had affirmed, in subsequent Title VII litigation).

89. *Elliott*, 478 U.S. at 790-93 (determining preclusive effect of findings by ALJ in subsequent § 1983 lawsuit when plaintiff did not seek review of administrative proceedings in Tennessee courts).

90. *Kremer*, 456 U.S. at 468 (citing Allen v. McCurry, 449 U.S. 90, 99 (1983)). For a complete discussion of the Supreme Court's opinion in *Kremer*, see *supra* notes 29-36 and accompanying text.

91. *Elliott*, 478 U.S. at 796. For a complete discussion of the Supreme Court's opinion in *Elliott*, see *supra* notes 37-49 and accompanying text.

92. *Elliott*, 478 U.S. at 799.

the preclusive effect of a state agency decision.[93] If a court has reviewed the agency decision, the court must analyze the statute at issue in the second lawsuit to determine if the statute repeals § 1738.[94] Similarly, if a court has not reviewed the agency decision, but state courts grant unreviewed agency decisions preclusive effect, the court must analyze the statute at issue in the subsequent lawsuit to see if application of a federal common law of preclusion is appropriate.[95] These general propositions, along with the progeny of *Kremer* and *Elliott*, both in the Supreme Court and in the Third Circuit, provide a framework for predicting the preclusive effect of state agency decisions under federal anti-discrimination statutes that the Court has yet to review.[96]

C. *The Final Factor: Meeting the State Law Requirements for Collateral Estoppel When a State Court Has Reviewed the Agency Decision*

If the federal statute under which an individual has sued requires a court to apply either § 1738 or the federal common law of preclusion to a prior state agency decision, assessing the precise preclusive effect of the agency's decision requires a determination of whether or not the state agency's findings satisfy that state's collateral estoppel requirements.[97] In *Kelley v. TYK Refractories*, the United States Court of Appeals for the Third Circuit clearly established that parties also must satisfy state law requirements of collateral estoppel before a federal court can afford a state

93. *Id.* at 796-97 ("Congress, in enacting the Reconstruction civil rights statutes, did not intend to create an exception to general rules of preclusion."); *Kremer*, 456 U.S. at 468-76 (discussing, in depth, legislative history of Title VII of Civil Rights Act of 1964). *Kremer* established that, in cases of reviewed state agency decisions, the § 1738 rules of preclusion apply in the subsequent lawsuit unless the statute at issue in the subsequent lawsuit repeals § 1738. *Kremer*, 456 U.S. at 468 (citing Allen v. McCurry, 449 U.S. 90, 99 (1980)). Similarly, if the agency decision has not been reviewed by a state court, but the courts of that state do afford preclusive effect to the findings of the agency, practitioners subsequently litigating under federal anti-discrimination statutes must be able to determine whether the federal common law of preclusion from *Elliott* exists for that particular statute. *See Elliott*, 478 U.S. at 799 (stating that federal courts must give unreviewed decision of agency acting in judicial capacity same preclusive effect to which it would be entitled in state's own courts).

94. *Kremer*, 456 U.S. at 468 ("Allen v. McCurry, 449 U.S. 90, 99 (1980), made clear that an exception to § 1738 will not be recognized unless a later statute contains an express or implied partial repeal."). For a discussion of the need to determine congressional intent concerning preclusion in cases of reviewed state agency decisions, see *supra* note 40 and accompanying text.

95. *Elliott*, 478 U.S. at 796 ("The question actually before us is whether a common-law rule of preclusion would be consistent with Congress' intent in enacting Title VII."). For a discussion of the federal common law of preclusion, see *supra* notes 40-49 and accompanying text.

96. For a full analysis of the federal anti-discrimination statutes in light of the framework set forth by the United States Supreme Court in *Kremer* and *Elliott*, see *infra* notes 113-46 and accompanying text.

97. *Elliott*, 478 U.S. at 799 ("[F]ederal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in State's own courts.").

agency decision preclusive effect.[98]

Pennsylvania state law sets forth the typical requirements for the existence of collateral estoppel:[99] (1) the issue decided in the agency proceeding must be identical to the issue presented in the subsequent action;[100] (2) the party against whom collateral estoppel is asserted in the federal lawsuit must have been a party or in privity with a party to the administrative proceeding;[101] (3) the issue must have been fully and fairly litigated in a prior action;[102] and (4) the prior action in which the issue was litigated must have resulted in a final judgment on the merits.[103] Two of these four elements are particularly susceptible to dispute in the context of the preclusive effect of state agency decisions: the requirement that the issues be identical, and the requirement that the parties have fully and fairly litigated the issue in the state agency proceeding.

1. *The Identical Nature of the Issues*

Determining whether issues are identical requires the practitioner to compare the precise findings of the state agency with the facts that the party invoking collateral estoppel seeks to establish in the subsequent lawsuit.[104] As an illustrative example, consider an individual who seeks to use the findings of Pennsylvania's Unemployment Compensation Board to

98. *See Kelley*, 860 F.2d at 1193 (commenting that district court, although properly applying *Kremer* and *Elliott*, erred by not analyzing Pennsylvania's law of collateral estoppel in order to determine preclusive effect of state agency's finding).

99. *Id.* at 1194 (citing Safeguard Mutual Insurance Co. v. Williams, 345 A.2d 664, 668 (Pa. 1975)). The elements of collateral estoppel under Pennsylvania law are similar to the elements of collateral estoppel in other states. *See, e.g.*, Jones v. Charles Warner Co., 83 A. 131, 134 (Del. Super. Ct. 1912) ("The rule is . . . that a former judgment on the merits . . . is conclusive and final as to any issue actually litigated and determined in the former action, [where the] issue is essential to . . . a second action between them, though it be brought upon a different cause of action."); Taha v. DePalma, 519 A.2d 905, 906 (N.J. Super. Ct. App. Div. 1986) (stating that collateral estoppel under New Jersey law requires matters to have been actually litigated and determined in prior action, and also that mattters were directly in issue between parties).

100. *Kelley*, 860 F.2d at 1194.

101. *Id.*

102. *Id.* A common test for determining whether an agency has actually litigated, and thus decided, an issue, if it is not explicitly mentioned in their decision, is to determine whether the issue in question was essential to the agency's decision. *See, e.g.*, J & L Steel Corp. v. Workmen's Compensation Appeal Bd. (Jones), 602 A.2d 912, 916 (Pa. Commw. Ct. 1992) (requiring that issue be essential to judgment before granting preclusive effect in subsequent lawsuit); City of Harrisburg v. Laukemann, 471 A.2d 132, 133-34 (Pa. Commw. Ct. 1984) (requiring issue before court to have been issue actually litigated previously); *see also* Scott, *supra* note 14, at 10-15 (discussing procedure for determining which issues are decided when two or more issues were raised in the initial lawsuit).

103. *Kelley*, 860 F.2d at 1194.

104. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c (1982) (discussing problem of delineating particular issue on which litigation may or may not be foreclosed by prior judgment); Allan D. Vestal, *Preclusion/Res Judicata Variables: Nature*

preclude relitigation of the issue of discrimination in a subsequent lawsuit based on Title VII. If the employee left work voluntarily, the employee must establish that he left work for cause of a "necessitous and compelling nature" in order to receive benefits under Pennsylvania's Unemployment Compensation Law. If the employee contends that discriminatory treatment by his or her employer was the sole cause of his unemployment, the Board must make a factual finding concerning this allegation to determine the validity of the employee's claim.[105] Thus, the Board's determination of the validity of the employee's claim will hinge solely upon the Board's factual finding concerning the existence or non-existence of discrimination. Likewise, in an employment discrimination lawsuit under Title VII, the employee must establish discriminatory treatment by the employer.[106] Because the issue whether or not the employer engaged in discriminatory conduct exists in both the state unemployment compensation proceeding and the Title VII proceeding, and because the issue is essential to the Board's decision, the employee has met the collateral estoppel requirement that the issues be identical.

In contrast to the preceding hypothetical, the Third Circuit, in *Kelley*, found that the requirement of identical issues was not satisfied in proceedings before the Board and in a subsequent lawsuit under § 1981.[107] The Third Circuit determined that the Board made no specific finding concerning the presence or absence of race discrimination, but found only that the applicant for unemployment benefits had no "necessitous and compelling cause" for voluntarily leaving work.[108] Accordingly, the court concluded that the Board's findings concerning the presence or absence of discrimination did not have preclusive effect in a subsequent action under § 1981, which also requires a finding of race discrimination.[109] *Kelley* establishes that the degree of precision of the state agency's findings often determines whether issues are identical for purposes of collateral estoppel.

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of the Controversy, 1965 WASH. U. L.Q. 158, 160-64 (discussing preciseness of issues requirement).

105. For a discussion of procedures for determining the validity of claims under Pennsylvania's Unemployment Compensation Law, see *supra* notes 18-26 and accompanying text.

106. 42 U.S.C. § 2000e-2 (1988) (describing unlawful employment practices in context of Title VII). *See generally* ANDREW J. RUZICHO ET AL., EMPLOYMENT DISCRIMINATION LITIGATION § 1.18 (1989) (discussing criteria for proof of discrimination under Title VII).

107. *Kelley*, 860 F.2d at 1194. For a discussion of the Third Circuit's decision in *Kelley*, see *supra* notes 53-67 and accompanying text.

108. *Kelley*, 860 F.2d at 1195-96. For a discussion of the Third Circuit's findings in *Kelley*, see *supra* notes 53-67 and accompanying text.

109. *Kelley*, 860 F.2d at 1196-97. For a discussion of the Third Circuit's conclusions in *Kelley*, see *supra* notes 61-67 and accompanying text.

2. *The Fully and Fairly Litigated Requirement*

Pennsylvania's law of collateral estoppel requires that the party opposed to the use of a prior judgment in a subsequent proceeding must have had an opportunity to fully and fairly litigate the issue decided by the state agency.[110] This requirement is also vulnerable to attack by a party arguing against finding preclusive effect.[111] While it is impossible to define absolutely the procedures that guarantee, in every instance, a full and fair opportunity to litigate, at a minimum, the agency proceedings must not offend the party's right to due process under the United States Constitution.[112] Therefore, if a party wishes to argue that they were denied a full and fair opportunity to litigate the issue in question, they must undertake a procedural due process analysis.

D. *Applying the Factors: Predicting the Preclusive Effect of State Agency Decisions Under the Federal Anti-Discrimination Statutes*

Upon ascertaining the level of state court review that an agency decision has received and determining that the elements of collateral estoppel have been satisfied, a party wishing to sue under a federal anti-discrimination statute must next determine whether such statute permits relitigation of a matter previously decided by a state agency.

1. *Title VII of the Civil Rights Act of 1964*

The preclusive effect of state agency decisions in subsequent lawsuits based on Title VII was settled by the United States Supreme Court's decisions in *Kremer* and *Elliott*.[113] In *Kremer*, the Court established that in Title

110. *See Kelley*, 860 F.2d at 1194 (describing Pennsylvania's collateral estoppel requirement of full and fair litigation).

111. *See, e.g.*, Consolidated Express, Inc. v. New York Shipping Ass'n, 602 F.2d 494, 504-05 (3d Cir. 1979) (requiring full and fair opportunity to litigate as prerequisite for collateral estoppel), *vacated on other grounds*, 448 U.S. 902 (1980). The full and fairly litigated requirement does not necessarily require that the issue have been decided in a trial. *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. d (1982) (requiring only that issue be properly raised, by pleadings or otherwise, and submitted for determination).

112. *See* Kremer v. Chemical Constr., Corp., 456 U.S. 461, 481 (1982) (stating that, for purposes of applying § 1738 to reviewed state agency decisions, state proceedings need only "satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law"). *See generally* 1B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.441[3.-3] (2d ed. 1993) (discussing parameters of full and fair opportunity to litigate concept); RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982) (listing exceptions to general rule of issue preclusion, many of which implicate concept of full and fair opportunity to litigate).

113. University of Tenn. v. Elliot, 478 U.S. 788, 794-95 (1986) (discussing preclusive effect of *unreviewed* state agency decision in subsequent Title VII lawsuit); *Kremer*, 456 U.S. at 468-85 (discussing preclusive effect of *reviewed* state agency decision in subsequent Title VII lawsuit). For a complete discussion of *Elliott*, see *supra* notes 37-49 and accompanying text. For a complete discussion of *Kremer*, see *supra* notes 29-36 and accompanying text.

VII cases federal courts must always grant preclusive effect to the reviewed decisions of state agencies.[114] The rationale supporting this rule is that neither the text nor the legislative history of Title VII shows any intent by Congress to repeal § 1738.[115] Conversely, in *Elliott*, the Court established that in Title VII cases a federal court may not grant preclusive effect to unreviewed decisions of state agencies.[116] The *Elliott* Court supported this holding by finding that Title VII's enforcement scheme evidenced Congress' intent not to apply the federal common law of preclusion to state agency findings in Title VII cases.[117]

2. *The Americans With Disabilities Act*

Although no federal court has determined the preclusive effect of the reviewed or unreviewed state agency decisions in litigation based on the Americans with Disabilities Act (ADA),[118] it is likely that the rules of preclusion under the ADA will mirror those of Title VII. Neither the text nor the legislative history of the ADA support an argument that Congress intended that the ADA repeal § 1738.[119] Accordingly, the ADA survives the *Kremer* test and courts should find that reviewed state agency decisions deserve preclusive effect in ADA litigation.

Similar to Title VII, courts should also find that unreviewed state agency decisions do not deserve preclusive effect in ADA lawsuits. This conclusion makes sense given that the ADA has adopted the same enforcement scheme as Title VII.[120] Under both enforcement schemes, state agencies and the EEOC have priority in resolving complaints of discrimination.[121] Furthermore, the ADA states that the EEOC must give substantial weight to the state agency's findings.[122] Importing the Court's logic from *Elliott*, one may conclude that Congress would not have included

114. *Kremer*, 456 U.S. at 485.

115. *Id.* For a discussion of the Court's rationale in *Kremer*, see *supra* notes 29-35 and accompanying text.

116. *Elliott*, 478 U.S. at 796.

117. *Id.* at 795-96. For a complete discussion of the Court's rationale in *Elliott*, see *supra* notes 37-49 and accompanying text.

118. 42 U.S.C. §§ 12101-12213 (Supp. V 1993).

119. *Id.* (failing to mention preclusion); H.R. REP. NO. 485(I), 101st Cong., 1st Sess. 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267 (setting forth legislative history and also failing to mention preclusion).

120. *See* 42 U.S.C. § 12117 (importing enforcement scheme of Title VII).

121. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(c) (1988). In pertinent part, section 2000e-5(c) reads:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice . . . no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law . . . .

Id.

122. *Id.* § 2000e-5(b) ("In determining whether reasonable cause exists, the

such a statement in the ADA if Congress intended for the unreviewed findings of a state agency to have preclusive effect.

3. *Section 1981*

The general rules concerning the preclusive effect of state agency findings, as set forth in *Kremer* and *Elliott*, apply to lawsuits based on alleged violations of § 1981.[123] In *Kelley*, the Third Circuit granted the state court-reviewed decision of the Pennsylvania Unemployment Compensation Board the same preclusive effect in federal court to which it was entitled in the Pennsylvania courts on the grounds that § 1738 mandated such action.[124] The Third Circuit made this decision without applying the *Kremer* test for determining whether § 1981 repeals § 1738.[125] Instead, the court recognized that *Elliott* requires federal courts to grant preclusive effect to unreviewed state agency decisions under any of the Reconstruction civil rights statutes.[126] By virtue of § 1738, reviewed decisions of state agencies always have a greater "right" to preclusive effect in later lawsuits than unreviewed decisions. As a result, the court reasoned that reviewed decisions of state agencies must always have at least the same preclusive effect in a later lawsuit as unreviewed decisions would have in that lawsuit.[127] Moreover, the *Kelley* court noted that *Elliott* established that the federal common law of preclusion applies to unreviewed state agency decisions in § 1981 lawsuits.[128]

4. *Section 1983*

The United States Supreme Court's decision in *Elliott* established that a federal common law of preclusion exists for unreviewed state agency decisions in subsequent litigation under § 1983.[129] The Court has also

Commission shall accord substantial weight to final findings and orders made by State or local authorities . . . .").

123. 42 U.S.C. § 1981 (1988).

124. Kelley v. TYK Refractories, Inc., 860 F.2d 1188, 1193 (3d Cir. 1988). For a complete discussion of the Third Circuit's opinion in *Kelley*, see *supra* notes 53-67 and accompanying text.

125. *See Kelley*, 860 F.2d at 1193-94 (deciding case on ground that state requirements of collateral estoppel were not satisfied for issue in question).

126. *Id.* at 1193 (citing University of Tennessee v. Elliott, 478 U.S. 788, 796-97 (1986)).

127. *See id.* (beginning with premise that unreviewed state agency decisions have preclusive effect in later lawsuits, and accordingly, so must reviewed state agency decisions).

128. *Id.* (citing University of Tennessee v. Elliott, 478 U.S. 788, 796-97 (1986)).

129. *But cf.* Edmundson v. Borough of Kennett Square, 4 F.3d 186, 189-93 (3d Cir. 1993) (declining to afford preclusive effect to unreviewed agency decision in subsequent § 1983 lawsuit on grounds that *Elliott* applies only to factfinding of administrative agency acting in judicial capacity and not to conclusions on legal issues); Gjellum v. City of Birmingham, 829 F.2d 1056, 1064-65 & n.21 (11th Cir. 1987) (stating that *Elliott* applies in context of issue preclusion, but not claim preclusion); Peery v. Brakke, 826 F.2d 740, 746 (8th Cir. 1987) (stating that *Elliott*

held that in § 1983 cases federal courts must afford preclusive effect to judgments issued by state courts.[130] The Court stated that both the text and legislative history of § 1983 clearly support the compatibility of § 1983 and the rules of preclusion.[131] Accordingly, § 1983 passes muster under the *Kremer* analysis and supports the conclusion that § 1983 does not repeal § 1738.

5. *The Age Discrimination in Employment Act*

Neither the United States Supreme Court nor the United States Court of Appeals for the Third Circuit has determined whether reviewed state agency findings have preclusive effect in lawsuits based on the Age Discrimination in Employment Act (ADEA).[132] Nevertheless, because no evidence exists that Congress intended for the ADEA to repeal § 1738, reviewed state agency decisions should have preclusive effect in ADEA lawsuits.[133] Also, the Supreme Court, in *Astoria Federal Savings & Loan v.*

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grants preclusive effect to findings of fact but not conclusions of law). For a discussion of the *Elliott* decision, see *supra* notes 37-49 and accompanying text.

130. Allen v. McCurry, 449 U.S. 90, 103-05 (1980). In *Allen*, the plaintiff, McCurry, was convicted of possessing heroin and assault with intent to kill in connection with a drug bust at his house. *Id.* at 92. McCurry filed a lawsuit under § 1983 against several police officers involved in the drug bust alleging a conspiracy to violate McCurry's Fourth Amendment rights, assault and an unconstitutional search and seizure of his house. *Id.* The police officers moved for summary judgment on the grounds that the state courts had already decided the issue of the legality of the search and seizure in a pretrial suppression hearing in connection with McCurry's criminal trial, and thus, collateral estoppel prevented McCurry from relitigating this question. *Id.* at 92-93. The United States Supreme Court found in favor of the police officers, holding that nothing in the text or legislative history of § 1983 prevented the police officers from invoking the doctrine of collateral estoppel in connection with the question of the legality of the search and seizure. *Id.* at 103-05.

131. *Id.* at 97. The Court found that "nothing in the language of § 1983 remotely expresses any Congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of [§ 1738]." *Id.* at 97-98. In fact, § 1983 is silent on the subject of the preclusive effect of state court judgments. *Id.* at 98. The Court also examined the legislative history of § 1983, noting that the statute's purpose was to suppress the "influence of the Ku Klux Klan and its sympathizers on the governments and law enforcement agencies of the Southern States." *Id.* Accordingly, the legislative history of § 1983 does not show any intent by Congress to repeal the traditional doctrines of preclusion. *Id.* at 98-99.

132. 29 U.S.C. § 623(a) (1988). In relevant part, the ADEA states that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." *Id.*

133. *See* Nichols v. City of St. Louis, 837 F.2d 833, 836 (8th Cir. 1988) (granting issue preclusive effect to state court judgments in ADEA case). In reaching its decision, the United States Court of Appeals for the Eighth Circuit did not employ a *Kremer*-type analysis to determine if the text and legislative history of the ADEA indicated a congressional intent to repeal § 1738. *Id.* at 835. Nevertheless, the Eighth Circuit still reached the conclusion that issue preclusion barred an em-

Solimino,[134] has suggested that it would afford reviewed agency decisions preclusive effect in ADEA lawsuits because of the closely parallel language of the ADEA and Title VII.[135] In *Astoria*, the Supreme Court determined that the federal common law of preclusion does not apply to state agency decisions in ADEA lawsuits.[136] The Court made this determination after engaging in an *Elliott*-type analysis of the enforcement provisions of the ADEA.[137] Specifically, the Court found these provisions nearly identical to those in Title VII.[138] The ADEA's enforcement scheme, like that of Title VII, clearly contemplates the possibility of federal consideration of complaints after the appropriate state agency has completed proceedings under state law.[139] Accordingly, despite the absence of an express statement from Congress in the ADEA's text or legislative history, the Court found the enforcement scheme of the ADEA sufficiently similar to that of Title VII to warrant an exception to the presumption of a federal common law of preclusion.[140]

6. *The Equal Pay Act*

Neither the United States Supreme Court nor the United States Court of Appeals for the Third Circuit has defined the preclusive effect of either reviewed or unreviewed state agency decisions in lawsuits under the Equal

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ployee's age discrimination action against a city hospital. *Id.* at 836. Procedurally, the Civil Service Commission (the Commission) first determined that the hospital discharged the employee for good cause. *Id.* at 834. Subsequently, the St. Louis Circuit Court, a Missouri state court, affirmed the Commission's decision. *Id.* The Eighth Circuit granted the Commission's findings preclusive effect in the ADEA action, relying on the fact that a state court had reviewed the Commission's decision and the fact that the employee "had been given a full and fair opportunity to litigate that issue before the Commission and the state circuit court." *Id.* at 835.

134. 501 U.S. 104 (1991).

135. *See id.* at 109 (noting that Court has found state court judgments, in closely parallel context of Title VII, to enjoy preclusive effect in federal courts).

136. *Id.* at 110-111. In *Astoria*, a former employee, Solimino, filed a charge with the EEOC alleging that his former employer had dismissed him in violation of the ADEA. *Id.* at 106. The EEOC referred the claim to a state agency, which found no probable cause to believe that the defendant employer terminated Solimino because of his age. *Id.* Solimino did not appeal the agency's decision to state court, but instead, proceeded with his ADEA lawsuit in federal court. *Id.* at 106-107.

137. *Id.* at 110-111.

138. *Id.*

139. *Id.* at 111. Like Title VII, the enforcement provisions of the ADEA also permit the EEOC to investigate claims of discrimination after termination of proceedings under state law. 29 U.S.C. § 626(d)(2) (1988). In addition, the Court did not find it significant that the ADEA lacks the "substantial weight" requirement of Title VII, stating that this language was not dispositive in the *Kremer* opinion. *Astoria*, 501 U.S. at 112. Moreover, the Court stated that the reason this provision was absent from the ADEA was because Congress was satisfied that the EEOC was extending the appropriate level of deference to the findings of state agencies. *Id.*

140. *Astoria*, 501 U.S. at 110-11.

Pay Act (EPA).[141] Nevertheless, applying the *Kremer* test to the EPA would result in the conclusion that reviewed state agency decisions should have preclusive effect in EPA lawsuits.[142] A review of the text and legislative history of the EPA reveals no congressional intent to have the EPA repeal § 1738.[143] In addition, the Fair Labor Standards Act (FLSA), which the EPA amended, contains no evidence of an intent by Congress to have the FLSA repeal § 1738.[144]

Moreover, application of the *Elliott* test also indicates that the federal common law of preclusion should apply to the EPA. Because neither the legislative history nor the text of the EPA makes any mention of whether the federal common law of preclusion applies, *Elliott* requires a review of the enforcement provisions of the EPA.[145] The EPA does not require that individuals first file complaints of discrimination with a federal agency before filing a lawsuit.[146] Accordingly, the EPA bears a greater resemblance to the Reconstruction Era civil rights statutes than to Title VII. Using the rationale of the *Elliott* Court, as applied to §§ 1981 and 1983, a federal common law of preclusion should apply to unreviewed state agency decisions in EPA lawsuits.

IV. CONCLUSION

The United States Supreme Court, when adopting the current approach in *Kremer* and *Elliott*, clearly remained faithful to the policies underlying the concept of full faith and credit in assessing the preclusive effect of state agency determinations in subsequent lawsuits based on federal anti-discrimination statutes.[147] In addition, the Court's decisions pro-

141. 29 U.S.C. § 206(d).

142. *Cf.* Kendall v. Avon Prods., Inc., 711 F. Supp. 1178, 1182-85 (S.D.N.Y. 1989) (holding that findings of state agency have preclusive effect in lawsuit based upon alleged violations of EPA, although not employing *Kremer* analysis).

143. *See* 29 U.S.C. § 206(d) (EPA statute prohibiting discriminatory wage policies); H.R. REP. NO. 309, 88th Cong., 1st Sess. (1963), *reprinted in* 1963 U.S.C.C.A.N. 687-92 (providing legislative history of EPA).

144. *See* 29 U.S.C. §§ 201-219 (1988) (setting forth relevant operative provisions of EPA but not mentioning preclusion).

145. *See* University of Tenn. v. Elliot, 478 U.S. 788, 795-97 (1986) (reviewing enforcement provisions of Title VII of Civil Rights Act of 1964); *see also* 29 C.F.R. § 1620 et seq. (1992) (providing enforcement provisions for EPA).

146. *See* EEOC v. Hernando Bank, Inc., 724 F.2d 1188, 1194 (5th Cir. 1984) (holding that EPA does not require complainant to petition EEOC for relief as precondition for filing lawsuit to enforce EPA); *accord* EEOC v. Home of Economy, Inc., 712 F.2d 356, 357 (8th Cir. 1983) ("[W]e hold that, unlike Title VII claims, there is no requirement that the EEOC conciliate EPA claims before filing suit."); Ososky v. Wick, 704 F.2d 1264, 1265 (D.C. Cir. 1983) ("[T]he EPA, unlike Title VII of the 1964 Civil Rights Act, provides for immediate judicial review of claims for equal pay.").

147. In *Allen v. McCurry*, the Supreme Court summarized the policies underlying res judicata and collateral estoppel, stating that "res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on

vide a workable framework for determining the preclusive effect of state agency findings in subsequent lawsuits based on federal anti-discrimination statutes.[148]

Nevertheless, some courts have ignored the subtleties of the *Kremer* and *Elliott* opinions when assessing the preclusive effect of state agency decisions.[149] In particular, these courts have tended to view the factor of state court review as dispositive, while ignoring the language and legislative history of the particular statute at issue in the subsequent lawsuit.[150]

Thus far, the United States Court of Appeals for the Third Circuit has remained loyal to the framework set forth by the United States Supreme Court in *Kremer* and *Elliott*. The Third Circuit in *Roth* has properly assessed the preclusive effect of an agency's decision in light of: (1) the level of state court review that the decision has received; (2) the particular federal statute under which the subsequent lawsuit was based; and (3) whether or not the state law requirements of collateral estoppel have been satisfied for the issue in question.

As Congress and state legislatures continue to enact laws that create administrative agencies with quasi-judicial authority, the finer points of *Kremer* and *Elliott* will become increasingly important. A practitioner must be capable of supporting arguments of congressional intent, through reliance on either legislative history or the *Elliott* enforcement provision rationale, to succeed when there is a question concerning the preclusive effect of a state agency's findings in subsequent litigation under a federal anti-discrimination statute.

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adjudication." 449 U.S. 90, 94 (1980) (citing Montana v. United States, 440 U.S. 147, 153-54 (1979)). Nevertheless, some commentators argue that the Supreme Court, in its effort to remain faithful to the policies underlying full faith and credit, has sacrificed the goals of the civil rights statutes. *See* Silver, *supra* note 4, at 369. Professor Silver goes as far as to argue that, "in the absence of exceptional circumstances, courts should refuse to give preclusive effect to agency determinations in subsequent litigation of claims arising under any federal civil rights statute, regardless of whether state courts would do so." *Id.*

148. For a discussion of the framework provided by the Supreme Court for assessing the preclusive effect of state agency decisions in subsequent litigation under the federal anti-discrimination statutes, see *supra* notes 27-49 and accompanying text.

149. *See, e.g.*, Nichols v. City of St. Louis, 837 F.2d 833 (8th Cir. 1988) (granting state agency decision preclusive effect in subsequent lawsuit under ADEA); Kendall v. Avon Prods., Inc., 771 F. Supp. 1178 (S.D.N.Y. 1989) (not using *Kremer* analysis in granting state agency decision preclusive effect in subsequent lawsuit under EPA).

150. For a discussion of particular cases in which courts have based their decisions concerning preclusive effect solely on the factor of state court review, see *supra* note 149.